(15,226.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 198.

T. J. BRYAN, APPELLANT,

vs.

M. W. KALES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 13, 1895.

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a T. J. BRYAN, Plaintiff & Appellant,
vs.
M. W. KALES, Defendant & Appellee.

Transcript on Appeal to the United States Supreme Court from the Supreme Court of the Territory of Arizona.

1 In the District Court of the Second Judicial District of Arizona in and for Maricopa County.

T. J. BRYAN
vs.
M. W. KALES.

Plaintiff, T. J. Bryan, complains of M. W. Kales, defendant, and alleges:

1st. That both plaintiff and defendant reside in Maricopa county, Arizona.

2nd. That plaintiff is now & on the 29th day of June, 1887, and since that date has been the owner and entitled to the possession of the following-described real estate situated in Maricopa county, Arizona, to wit:

160 acres — land known as the southeast quarter of section two, in township one north, of range three (3) east, Gila and Salt river meridian, and of the district of lands subject to sale at the United States land office at Tucson, Arizona, and the same land patented to Wm. B. Hellings by letters patent bearing date about April 15th, 1875.

3rd. That afterwards, to wit, about July 1st, 1887, and before the commencement of this action, defendant entered into and dispossessed plaintiff of said land and premises, and since that date has and now does unlawfully withhold from plaintiff the possession thereof.

Wherefore plaintiff prays judgment for the possession of said land and premises, for cost of suit, and general relief.

CAMERON H. KING,
E. J. EDWARDS,
GOODRICH, SMITH, STREET & GOODRICH,
Att'ys for Plaintiff.

2 In the District Court of the Second Judicial District of the Territory of Arizona in and for Maricopa County.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant.

Action brought in the district court of the second judicial district of the Territory of Arizona in and for Maricopa county & the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona.

To M. W. Gales, defendant, Greeting:

You are hereby summoned and required to apfear in an action brought against you by the above-named plaintiff in the district court of the second judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the time above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

(Seal of Court.) Given under my hand and seal of the district court of the second judicial district of the Territory of Arizona in and for Maricopa county this 12th day of August, A. D. 1887.

J. E. WALKER,
Clerk of said District Court.

3 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } No. 775.

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss:*

George T. Martin, being first duly sworn, says:

I am not interested in the above-entitled action and am competent to make oath of the fact of the service of summons therein.

I personally served the annexed summons in the above-entitled action on the 12th day of August, 1887, upon M. W. Kales, being the defendant named in said summons, by delivering to said defendant, M. W. Kales, in person, in the city of Phœnix, Maricopa county, Territory of Arizona, a true copy of said summons.

GEORGE T. MARTIN.

Subscribed and sworn to before me this 27th day of October, 1887.

L. H. CHALMERS,
Notary Public.

[NOTARIAL SEAL.]

4 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN *et al.*
vs.
M. W. KALES.

Now comes the plaintiff in the above-entitled action and, by leave of the court first had, amends his original complaint on file herein, and for amendment to said complaint alleges in addition to what is stated in said original complaint and says that he claims the premises described in his original complaint by deed through Vina Brown, formerly Vina Bryan; that said Vina Brown is and was the surviving widow of J. M. Bryan, deceased; that said J. M. Bryan died intestate on the 29th day of August, 1883, without issue; that the property in controversy in this action was acquired by onerous title during the marriage of said Vina Bryan, now Vina Brown, and J. M. Bryan; that letters of administration on said J. M. Bryan's estate were granted to M. W. Kales on or about September 24th, 1883; that said estate was fully administered upon and the administration closed and the administrator finally discharged from his trust December 6th, 1884.

W. STREET,
BEN. GOODRICH,
Att'ys for Plaintiff.

5 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant.
No. 775.

Now comes the above-named defendant and, answering plaintiff's complaint filed herein, alleges:

I.

That this plaintiff should not be allowed to maintain this action without joining with him as plaintiff one Cameron King and one E. J. Edwards, because prior to the commencement of this action, to wit, on the fourth day of July, 1887, said T. J. Bryan, the plaintiff herein, sold and conveyed by quitclaim deed to said Cameron King and said E. J. Edwards an undivided one-half of his pretended interest and alleged title in and to the lands described in said complaint.

II.

For a further defense defendant alleges that when this action was commenced there was another action brought in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa by the said T. J. Bryan, in conjunction with one Cameron King and one E. J. Edwards, for the same supposed cause of action and for the recovery of the same property set forth in plaintiff's complaint in this action, which said action is now pending.

III.

For another defense defendant alleges that plaintiff ought not to have and maintain this action, because defendant has had and held peaceable and adverse possession under title of the lands described in plaintiff's complaint for more than three years next before the commencement of this action.

6 IV.

For another defense defendant alleges that the pretended interest and title through and by which plaintiff claims the land described in his complaint was acquired by said plaintiff while defendant was in peaceable and adverse possession of said land, and of which said land or any part thereof plaintiff has never been in possession.

V.

And for further defense defendant alleges that plaintiff ought not to be allowed to allege that he is the owner in fee-simple or otherwise or has any interest in or to the lands described in his complaint through or by any conveyance from one Vina Brown, because on the 9th day of October, 1883, a judgment was duly and regularly made and entered in and by the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa in an action wherein M. W. Kales was plaintiff and M. W. Kales, administrator of the estate of J. M. Bryan, deceased, and the said Vina Brown (then known as Vina Bryan) and M. Asher and brother were defendants, whereby it was ordered, adjudged, and decreed in substance that the said lands described in the complaint herein be sold at sheriff's sale to satisfy the amount specified in said judgment, and leave was granted in said judgment to this defendant to become a purchaser at said sale; whereupon an order of sale, under said judgment, was issued out of said district court on November tenth, 1883, and said land was regularly sold at sheriff's sale thereunder, and the same was never redeemed.

VI.

Defendant further says that plaintiff ought not to be allowed to maintain this action, because the defendant was heretofore, in the month of September, 1883, at the request of said Vina Brown, appointed administrator of the estate of J. M. Bryan, deceased, by the

probate court of Maricopa county, Arizona; that in due
7 course of administration and at the proper time this defendant, as such administrator, exhibited to the probate court (which court had sole jurisdiction in the premises) a full, true, complete, correct, and final account of all his actions as such administrator in connection with the administration of said estate, in which said final account was exhibited and set forth the action had and done by this defendant as such administrator in relation to the lands and premises set forth and described in plaintiff's complaint; that the said Vina Brown (then known as Vina Bryan and wife and heir-at-law of said deceased) had full and legal notice of the presentation and filing of said account and of the time and place fixed for the hearing, settlement, and approval thereof; that the said Vina Brown then or thereafter made no objection to the said account or any part thereof, nor objected to its allowance, settlement, and approval, and the said account as exhibited, filed, and rendered was duly settled, approved, and allowed by the said probate court.

VII.

Defendant further alleges that the said Vina Brown well knew of the sale of the lands set forth and described in plaintiff's complaint under and by virtue of the judgment rendered in the district court of the 2nd judicial district of Arizona in and for Maricopa county in the action wherein M. W. Kales was plaintiff and M. W. Kales, administrator of the estate of J. M. Bryan, deceased, and Vina Bryan were defendants, and of the purchase of said lands by this defendant, and of his entry into possession of the same, and of his making large and valuable improvements thereon, to none of which she at any time made any objections, but remained silent and acquiesced in the same for more than three years after said sale.

8 For a further answer to plaintiff's complaint defendant denies all and singular the matters and things in said complaint set forth, and pleads not guilty thereto.

Having fully answered, defendants prays that plaintiff take nothing by this action, and that he have judgment for his costs.

BAKER & CAMPBELL AND
CLARK CHURCHILL,
Attorneys for Defendant.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

G. W. Hoadley, being duly sworn, says that he is the agent of M. W. Kales, the defendant in the above-entitled action, who is not now within the Territory of Arizona; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

G. W. HOADLEY.

Subscribed and sworn to before me this first day of September, A. D. 1887.

J. E. WALKER,
Clerk of District Court.

9 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } No. 775.

Now comes the above-named defendant and, answering plaintiff's complaint filed herein, alleges:

I.

That this plaintiff should not be allowed to maintain this action without joining with him as plaintiffs one Cameron King and one E. J. Edwards, because prior to the commencement of this action, to wit, on the fourth day of July, 1887, the plaintiff herein sold and conveyed to said Cameron King and E. J. Edwards an undivided one-half of his pretended interest and alleged title in and to the lands described in said complaint.

II.

For a further defense defendant alleges that when this action was commenced there was another action pending in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa, wherein said T. J. Bryan was plaintiff and against this defendant for the same supposed cause of action and for the recovery of the same land described in plaintiff's complaint herein; which said action is still pending.

III.

10 For another defense defendant alleges that plaintiff ought not to have and maintain this action, because defendant has had and held peac-able and adverse possession under title of the lands described in plaintiff's complaint for more than three years next before the commencement of this action.

IV.

For another defense defendant alleges that the pretended interest and title through and by which plaintiff claims the land described in his complaint was acquired by said plaintiff while defendant was in the peaceable and adverse possession of said land and of which said land or any part thereof plaintiff has never been in possession.

For a further defense defendant says that he is not guilty of the supposed wrongs, injuries, and trespasses laid to his charge or any or either of them in manner and form as the said plaintiff hath thereof complained against him.

Having fully answered, defendant prays to be hence dismissed with his costs.

BAKER & CAMPBELL,
CLARK CHURCHILL,
Attorneys for Defendant.

TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

M. W. Kales, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes them to be true.

M. W. KALES.

Subscribed and sworn to before me this twenty-second day of December, A. D. 1887.

JOSEPH CAMPBELL,
Probate Judge, Maricopa County.

11 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } No. 775.

Now comes the plaintiff and demurs generally to defendant's amendments to his original answer, filed respectfully July 9th, 1890, and July 9th, 1890, and for demurrer says:

That the same is insufficient in law and does not state facts sufficient to constitute any defense to this action, and of this he prays judgment of the court.

And for a special exception to said amendments plaintiffs demurto all that portion of said amendments which sets up the judgment of the district court of Maricopa county, of date Oct. 9th, 1883, in which M. W. Kales was plaintiff and M. W. Kales, administrator of the estate of J. M. Bryan, deceased; Vina Bryan, now called Vina Brown, and M. Asher and Bro. were defendants, the order of sale of the land in controversy in this action and the leave of the court incorporated in said judgment, authorizing said M. W. Kales to become a purchaser at said sale; the issuance of the order of sale under said judgment, and the sale thereof under said order, because it appears on the face of said amendments that all the times mentioned therein the said M. W. Kales was both plaintiff and defendant and was administrator of the estate of J. M. Bryan, deceased, whose property was sought to be sold by virtue of said decree; and for further exception plaintiff demurs to all that portion of defendant's amendments setting up the indebtedness of J. M. Bryan,

deceased, for $5,615; the execution of said Bryan's promos-ory
12 note to said Kales therefor, and the execution, by J. M. Bryan and Vina Bryan, of the mortgage therein described to said M. W. Kales to secure said note; the death of said J. M. Bryan; the appointment of said M. W. Kales as administrator of said estate; his qualification as such administrator; the institution of the suit of M. W. Kales on Oct. 3rd, 1883, against M. W. Kales, administrator of said Bryan's estate, and Vina Bryan, defendants; the rendition of judgment in said action foreclosing said mortgage and the order of sale thereof; the issuance of an order of sale and the sale thereunder and under said judgment; the purchase of the land in controversy by M. W. Kales at said sale; the entering into possession thereof by said Kales and making improvements upon the land; and because it appears upon the face of said amendment itself that at all the times mentioned therein said Kales occupied the position in said action of both plaintiff and defendant, and was the administrator of the estate of said J. M. Bryan, deceased, whose property was sought to be sold under said judgment, and was both vendor and vendee and beneficiary and trustee; and for further exception plaintiff says that it appears upon the face of said amendments that said mortgage and note are barred by the statute of limitation, and that the action thereon accrued more than four years next before the date of the filing of said amendments to said original complaint.

Wherefore plaintiff prays that said portion of said answer be stricken out.

GOODRICH & STREET,
Att'ys for Plaintiff.

13 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN
vs.
M. W. KALES. } No. 775.

Now comes the plaintiff and demurs to defendant's answer and amended answer herein filed, except his general denial and the plea of not guilty, and for demurrer says that the same is insufficient in law and does not state facts sufficient to constitute a defense to this action.

W. STREET,
BEN. GOODRICH,
E. J. EDWARDS,
Att'ys for Plaintiff.

14 In the District Court, Second District, Arizona Territory, Maricopa County.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant.

Now comes the defendant, by leave of the court first had, and files the followeng amendment to his amended answer in addition to what is therein alleged, to wit:

That plaintiff ought not to be allowed to allege he is the owner in fee-simple or otherwise or has any interest in the lands described in his complaint through or by any conveyance from Vina Brown, because on the 9th of October, 1883, a judgment was duly and regularly given and made in and by the district court of the 2nd judicial district of Arizona in and for Maricopa county in an action wherein M. W. Kales was plaintiff and M. W. Kales, administrator of the estate of J. M. Bryan, deceased, and Vina Brown, then known as Vina Bryan, and M. Asher and Brother were defendants, whereby it was ordered, adjudged, and decreed in substance that the said lands described in the complaint herein be sold at sheriff's sale to satisfy the amount specified in said judgment, and leave was granted in said judgment to the defendant to become a purchaser at said sale; whereupon an order of sale under said judgment was issued out of the said district court on November 10, 1883, and said land was regularly sold at sheriff's sale thereunder, and the same was never redeemed; that the said judgment is still in force and unreversed.

BAKER & CAMPBELL,
Att'ys for Def't.

15 And for further answer defendant says that said J. M. Bryan, upon the 26th day of May, 1883, was indebted to this defendant in the sum of $5,615.00, and executed therefor his promissory note, payable on the 26th day of May, 1883, with interest thereon at the rate of 1½ per cent. per month, and upon said day, to secure the payment thereof, said J. M. Bryan and Vina Bryan, his wife, made and executed the mortgage upon the lands and premises described in plaintiff's complaint, which said mortgage was duly acknowledged and recorded on the 26th of May, 1882, on Book 2 of Mortgages, page 380 *et seq.*; that thereafter, on the 29th day of August, 1883, said J. M. Bryan died intestate at said Maricopa county; that thereafter, on the 24th September, 1883, M. W. Kales was duly appointed by probate court of said county administrator of the estate of J. M. Bryan, deceased, and duly qualified as such; that the interest upon said principal sum mentioned in said note and mortgage had been paid to Sept. 26th, 1883, but no part of the principal had been paid except the sum of $318.00.

That thereafter, on the 3rd of Oct., 1883, the mortgagee named in said mortgage commenced an action in the district court, second district of Arizona, in and for Maricopa county, wherein M. W. Kales was the plaintiff and M. W. Kales, administrator of the estate

of J. M. Bryan, deceased, and said Vina Bryan were defendants, for the foreclosure of said mortgage; that thereafter, to wit, on the 16th day of October, 1883, a judgment was made and rendered in said action, wherein it was decreed that the lands and premises described in plaintiff's complaint be sold in satisfaction of said mortgage.

That thereafter an order of sale was issued on said judgment and the land and premises described therein, to wit, the land described in plaintiff's complaint, were sold in the manner provided by law by the sheriff of Maricopa county.

16 That at such sale this defendant became the purchaser of said land and premises for the sum of $4,500, which said sum was paid by this defendant and which said sum said estate of J. M. Bryan, deceased, received and had the use and benefit.

That said lands and premises were never redeemed from the defendant.

That thereafter, on the 19th of June, 1884, L. H. Orme, sheriff making such sale, made, executed, and delivered to this defendant a deed for said premises; that thereupon defendant went into possession of said premises and every part thereof and ever since then has held and now holds and occupies the same; that since said 19th of June, 1884, said defendant in good faith expended large sums of money in the payment of assessments and taxes upon said premises and in making improvements thereon, amounting to the sum of $4,476.05.

That the said principal and interest mentioned in said mortgage *has* never been paid by the estate of J. M. Bryan, deceased, — Vina Bryan otherwise than by the foreclosure above mentioned, nor by this plaintiff, nor has the same or any part thereof been tendered to the defendant by Vina Bryan, this plaintiff, or any other person.

BAKER & CAMPBELL,
Att'y- for Def't.

17 775.

Minute Order Overruling Demurrer.

This day came on to be heard plaintiff's demurrers to defendant's amendments to his amended answer filed July 9th, 1890, and, having duly considered same, order that said demurrer be, and the same is hereby, overruled; to which plaintiff excepts.

18 T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } 775.

This cause came on regularly for trial on the 8th day of July, 1890, Baker & Campbell and Clark Churchill appearing for defendant and Goodrich & Street and E. J. Edwards for the plaintiff.

A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury.

Whereupon witnesses upon the part of the plaintiff and defend-

ant were duly sworn and examined and documentary evidence introduced by the respective parties, and, the evidence being closed, the cause was submitted to the court for consideration and decision.

And after due deliberation thereon, upon the —th day of December, 1890, the court orders that judgment be entered herein in favor of the defendant.

Wherefore, by reason of the law and premises aforesaid, it is ordered, adjudged, and decreed that M. W. Kales, the defendant, is not guilty of the wrongs and trespasses in manner and form as alleged against him in plaintiff's complaint.

That the plaintiff, T. J. Bryan, recover nothing by this action, and that the defendant, M. W. Kales, do have and recover of and from the plaintiff, T. J. Bryan, the sum of $58.40 *dollars*, defendant's costs and disbursements incurred in this action.

Done in open court this 6th Dec., 1890.

19 T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } 775.

This cause came on regularly for trial on the 18th day of July, 1890, Baker & Campbell and Clark Churchill appearing for defendant and Goodrich and Street and E. J. Edwards for the plaintiff.

A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury.

Whereupon witnesses upon the part of the plaintiff and defendant were duly sworn and examined and documentary evidence introduced by the respective parties, and, the evidence being closed, the cause was submitted to the court for consideration and decision.

After due deliberation thereon, upon the 1st day of December, 1890, the court orders that judgment be entered herein in favor of the defendant.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that M. W. Kales, the defendant, is not guilty of the wsongs and trespasses in manner and form as alleged against him in plaintiff's complaint.

That the plaintiff, T. J. Bryan, recover nothing by this action, and that the defendant, M. W. Kales, do have and recover of and from the plaintiff, T. J. Bryan, the sum of $58.40, defendant's costs and disbursements incurred in this action.

Done in open court December 6th, 1890.

20 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } No. 775.

Plaintiff's First Bill of Exceptions.

Be it remembered that on the trial of this cause, after the plaintiff had put in his affirmative testimony aspiring to show the title to

the premises in dispute to be in himself and aspiring to show the right of possession thereto by deeds of gesne conveyance from a common source, the defendants, in order to sustain the issue upon their side, among other things, offered in evidence a mortgage from J. M. Bryan and Vina Bryan, his wife, to M. W. Gales, dated this 26th day of May, 1882, together with the note described in said mortgage for the sum of $5,615; to the introduction of which plaintiff objected for the reason that it did not tend to show in any way title in the defendant, and for the reason that upon the dace it showed itself to be barred by the statute of limitation, and for the further reason that it appeared upon its face that it had been satisfied; which objections were overruled by the court and the said instruments were admitted in evidence; to which ruling of the court and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

21 II.

Plaintiff's Second Bill of Exceptions.

Be it further remembered that on the trial of this cause, in order to further maintain the issue on their behalf, among other things, the defendants offered in evidence the judgment-roll in the case of M. W. Kales against M. W. Kales, administrator of the estate of J. M. Bryan, deceased, and Vina Bryan, Dolph Asher, and Morris Asher, being No. 327 of this court and in which the complaint was filed Oct. 3rd, 1883; to the admission of which the plaintiff objected because it shows that Kales was both plaintiff and defendant in the case, and because, especially when taken in connection with other proof already introduced by the plaintiff, that he was the same man, and because there is no denial of that fact, and because it was therefore void; which objection was overruled, and the judgment-roll was admitted; to which ruling of the court and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

22 III.

Plaintiff's Third Bill of Exceptions.

Be it remembered that on the trial of this cause, in order to further maintain the issues on his behalf, the defendant offered in evidence a copy of the judgment and decree and the return of the sheriff thereon in said cause No. 327; to which offer the plaintiff objected because it appeared that Kales, being the same party plaintiff and defendant, was both claimant and defendant in that case, and he would be unable to execute that judgment unless you could execute both against Kales and Mrs. Bryan, and, in consequence of his

being both plaintiff and defendant, it cannot be executed against her unless it is executed against him, and because it appears that he was administrator of the estate and an indispensable party, and that a man cannot sue himself, and because the judgment, being void in part, is void *in toto;* which objections were overruled and the copy of the judgment and decree admitted in evidence; to which ruling of the court and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

23 IV.

Plaintiff's Fourth Bill of Exceptions.

Be it remembered that on the trial of this cause, in order to further maintain the issues upon his part, among other things, the defendant offered in evidence the certificate of sale from Orme, sheriff, to Kales; to the admission of which the plaintiff objected for the reason that it was based upon a void judgment, No. 327, and for other reasons set out in plaintiff's bill of exceptions No. 3; which objections were overruled and the certificate admitted as evidence; to which ruling of the court and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

24 *Plaintiff's Fifth Bill of Exceptions.*

Be it remembered that on the trial of this cause, in order to further maintain the issues upon his behalf, among other things, the defendant offered in evidence the sheriff's deed from Orme to Kales for the property in controversy; to the admission of which the plaintiff objected for the reason that it was based upon a void certificate of sale and a void judgment, being the same judgment that appeared in No. 327; which objection was overruled and the deed admitted in evidence; to which admission and ruling the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

25 VI.

Plaintiff's Sixth Bill of Exceptions.

Be it remembered that on the trial of this cause, in order to further maintain the issues upon his behalf, among other things, the defendant offered to show by himself, as a witness in his own behalf, that he had never received any money on this mortgage; to the

admission of which plaintiff objected because it is irrelevant and immaterial and not tending to prove any issue in this case; which objection was overruled and the defendant was allowed to answer, and he did state that the mortgage was paid only by the purchaser of the land, and that there was a small per cent. of deficiency afterwards, and that he bought the same in for $4,000; to which ruling of the court and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

26 *Plaintiff's Seventh Bill of Exceptions.*

Be it further remembered that on the trial of this cause and on the hearing of the plaintiff's general demurrer and special demurrer to this amended answer that the same was overruled and the amended answer as filed by the defendant was allowed to stand; to which overruling of the plaintiff's demurrer the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

The foregoing bills of exceptions numbered I, II, III, IV, V, VI, & VII were presented to me on the 9th December, 1890, & by me on that day presented to counsel for the opposite party, and now, on the 5th January, 1891, having examined each of said bills and found them correct, I have signed them.

JOSEPH H. KIBBEY, *Judge.*

27 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } No. 775.

Now comes plaintiff and moves for a new trial herein and specifies the grounds upon which said motion is founded as follows, to wit:

I.

The court erred in overruling the plaintiff's general demurrer to defendant's amendment to his original answer filed July 9th, 1890, as also in overruling the special demurrer to all that portion of the amendment which sets up the judgment of the district court in which Kales, the plaintiff, sued Kales as administrator and which sets up the order of sale to the land authorizing Kales to become purchases, and to all the matter setting up the indebtedness of Bryan to Kales and the promissory note, the appointment of Kales as administrator, and to all the matters set up in the defendant's amendment as aforesaid, and overruling demurrer to answer filed May 19th, 1890.

II.

The court erred in refusing to allow the plaintiff to show by the witness Kales that he was one and the same individual who appeared as plaintiff in the suit of M. W. Kales as administrator and as M. W. Males individually in numbir 327.

28 III.

The court erred in admitting as evidence for the defendant against the objection of the plaintiff the mortgage from J. M. Bryan and Vina Bryan, his wife, to M. W. Kales, and also the judgment-roll in the case of M. W. Kales against M. W. Kales, administrator of the estate of J. M. Bryan, deceased; the certificate of sale from L. H. Orme, sheriff, to M. W. Kales, following such judgment, and the deed based upon said judgment following such certificate of sale to M. W. Kales, and the probate records in case of J. M. Bryan, deceased.

IV.

The court erred in admitting testimony from M. W. Kales on behalf of defendant against the objection of the plaintiff as to his paying four thousand five hundred dollars for the property or as to any amount he paid for the property, as also to the amount and character of the improvements that he had placed upon the property, and as to the amount of taxes he had paid on the property, the final account of the administrator, and the settlement of the estate of J. M. Bryan, deceased.

V.

The court erred in the matter of law in not ruling that the judgment based on the mortgage of Bryan and wife to Kales, in the suit of Kales against Kales, in the second judicial district of Maricopa county, Arizona Territory, together with the order of sale and the return of the sheriff, the certificate of sale, and the sheriff's deed based on the same, was not a nullity, and in not ruling that any possession obtained by the defendant of any premises which were sold by himself to himself through the sheriff on a judgment obtained in a suit brought by himself against himself is not a nullity, and in admitting it as evidence against the title of plaintiff and his right of possession, and specifies further the grounds upon which the motion for a new trial should be granted. The plaintiff says:

29 I.

That the judgment is contrary to law and the evidence and is unsupported by the evidence; that upon the evidence and under the law the judgment should have been for the plaintiff instead of for the defendant; that the whole evidence shows the fact to be that plaintiff was the *the* owner of the title to the land in dispute and was entitled to the possession of it; that he had been ousted by the defendant; that defendant was in possession against plaintiff's right of possession; that the judgment and certificate of sale from the

sheriff — the sheriff's deed, by which defendant got into possession, are and were void and gave defendant no right, title, or right to the possession of any part of said premises; that the deed from Nathan Ross to Jonathan M. Bryan and from Vina Brown to T. J. Bryan, together with the evidence of Vina Brown that she was the surviving widow and heir-at-law of J. M. Bryan, deceased, clearly established the title and the right to the possession of the premises in the plaintiff, T. J. Bryan, and that the judgment, certificate of sale, the sheriff's deed, and all proceedings based upon the judgment of Kales against Kales in the district court of Maricopa county gave no right whatever to the defendant to the possession or the right of the land in dispute.

He therefore moves that the judgment rendered on the 6th day of December, 1890, be set aside and that *we* have a new trial.

Dec. 6th, 1890.

GOODRICH & STREET,
Att'ys for Plaintiff.

30 November Term, 1890.

DECEMBER 16TH, 1890.

BRYAN *vs.* KALES. } 775. Motion for a New Trial Overruled.

Comes now the counsel for the plaintiff herein and, having argued the motion for a new trial heretofore filed by said plaintiff and the court — overruled said motion and granted to said plaintiff ten days in which to file his bill of exceptions and thirty days to file his statement of facts, *and* the said counsel then and there gave due notice of his appeal to the supreme court of Arizona from the judgment and order overruling the motion for a new trial.

31 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff, *vs.* M. W. KALES, Defendant. } No. 775.

Plaintiff's Bill of Exceptions.

Be it remembered that on the 16th day of December, 1890, there came on to be heard before the court during the same term thereof at which judgment was rendered plaintiff's motion for a new trial, which had been regularly filed with the clerk of said court during the term and within two days after the conclusion of the trial; which motion for a new trial is as follows, to wit:

Title of Court and Cause.

Now comes plaintiff and moves for a new trial herein and specifies the grounds upon which said motion is founded as follows, to wit:

I.

The court erred in overruling the plaintif-'s general demurrer to defendant's amendments to his original answer, filed July 9th, 1890, as also in overruling the special demurrer to all that portion of the amendment which sets up the judgment of the district court in which Kales, the plaintiff, sues Kales as administrator, and which sets up the order of sale to the land authorizing Kales to be-
32 come purchaser, and to all the matter setting up the indebtedness of Bryan to Kales and the promissory note, the appointment of Kales as administrator, and to all the matters set up in the defendant's amendments as aforesaid, and overruling demurrer to answer filed May 19th, 1890.

II.

The court erred in refusing to allow the plaintiff to show by the witness Kales that he was one and the same individual who appeared as plaintiff in the suit of M. W. Kales as administrator and as M. W. Kales individually, in number 327.

III.

The court erred in admitting — evidence for the defendant, against the objection of the plaintiff, the mortgage from J. M. Bryan and Vina Bryan, his wife, to M. W. Kales; and also the judgment-roll in the case of M. W. Kales against M. W. Kales, administrator of the estate of J. M. Bryan, deceased; the certificate of sale from L. H. Orme, sheriff, to M. W. Kales following such judgment; the deed based upon such judgment and following such certificate of sale to M. W. Kales, and the probate records in the case of J. M. Bryan, deceased.

IV.

The court erred in admitting testimony from M. W. Kales on behalf of the defendant, against the objection of the plaintiff, as to his paying four thousand five hundred ($4,500) dollars for the property, as also the amount and character of the improvements that he had placed upon the property and as to the amount of taxes he had paid on the property, the final account of the administrator, and the settlement of the estate of J. M. Bryan, deceased.

33 V.

The court erred in the matter of law in not ruling that the judgment based on the mortgage of Bryan and wife to Kales in the suit of Kales against Kales in the second judicial district court of Maricopa county, Arizona Territory, together with the order of sale and the return of the sheriff, the certificate of sale and the sheriff's deed based on the same was a nullity, and in not rsling that any possession obtained by the defendant of any premises which were sold by himself to himself, through the sheriff, on a judgment obtained in a suit brought by himself against himself in a nullity, and in ad-

mitting it as evidence against the title of plaintiff and his right of possession.

And specifying further the grounds upon which the motion for a new trial should be granted, the plaintiff says:

I.

That the judgment is contrary to law and the evidence and is unsupported by the evidence; that upon the evidence and under the law the judgment should have been for the plaintiff instead of for the defendant; that the whole evidence shows the fact to be that plaintiff was the owner of the title to the land in dispute and was entitled to the possession of it; that he had been ousted by defendant; that defendant was in possession against plaintiff's right of possession; that the judgment and certificate of sale from the sheriff, the sheriff's deed by which defendant got into possession, are and were void and gave defendant no right, title, or right to the possession of any part of said premises; that the deed from Nathaniel Ross to Jonathan M. Bryan, together with the evidence of Vina Brown that she was the surviving widow and heir-at-law of J. M. Bryan, deceased, clearly established the title and the right to the possession of the premises in the plaintiff, T. J. Bryan, and that the judgment, certificate of sale, the sheriff's deed, and all proceedings based upon the judgment of Kales in the district court of
34 Maricopa county gave no right whatever to the defendant to the possession or the title of the lands in dispute.

He therefore moves that the judgment rendered on the 6th day of December, 1890, be set aside, and that he have a new trial.

GOODRICH & STREET,
Att'ys for Plaintiff.

December 6th, 1890.

Yet, notwithstanding the consideration of all said testimony produced upon the trial and all the objection- set out in motion for a new trial, the court overruled plaintiff's motion for a new trial and allowing the judgment, which was theretofore entered on the 6th day of December, 1890, to stand as a valid judgment; which judgment is as follows, to wit:

In the District Court of the Second Judicial District of Arizona Territory in and for Maricopa County.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } No. 775.

This cause came on regularly for trial on the — day of ——, 1890, Messrs. Baker & Campbell and Clark Churchill appearing for defendant and Messrs. Goodrich & Street and E. J. Edwards, Esq., for the plaintiff. A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury; whereupon witnesses upon the part of the plaintiff and de-

fendant were duly sworn and examined and documentary evidence introduced by the respective parties, and, the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, upon the 6th day of De-
35 cember, 1890, the court orders that judgment be entered herein in favor of the defendant.

Wherefore, by reason of the law and the premises aforesaid, it is ordered and decreed that M. W. Kales, the defendant, is not guilty of the wrongs and trespasses in manner and form as alleged against him in plaintiff's complaint; that the plaintiff, T. J. Bryan, recover nothing by this action, and that the defendant, M. W. Kales, do have and recover of and from the plaintiff, T. J. Bryan, the sum of $58.40, defendant's costs and disbursements incurred in this action.

Done in open court December 6th, 1890.

To all of which ruling, the overruling of plaintiff's motion for a new trial and the allowing of said judgment to stand, the plaintiff then and there excepted and presented this his bill of exceptions during the term and withio ten days of the conclusion of the trial in that particular to the court for allowance, and the same was allowed.

Presented to me on the 23rd December, A. D. 1890, and by me on said day presented to counsel for the opposite party, and now, having examined the same and found it correct, I have, this 5th day of January, A. D. 1891, signed the same.

JOSEPH H. KIBBEY, *Judge.*

PHŒNIX, *Dec.* 23, 2890.

We hereby admit that the foregoing bill of exceptions was presented to the judge of the court on the 23rd day od December, A. D. 1890, for allowance and was by him submitted on that day to the attorneys for the defendants; all of which is done within ten days after the motion for a new trial was overruled and during the same term of court.

BAKER & CAMPBELL,
Att'y- for Def't.

36 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } No. 775.

Statement of Facts.

This is an action of ejectment for the S. E. ¼ of section two, T. — N., R. 3 E., G. and S. R. M., situate in Maricopa county, Arizona, brought by the plaintiff against the defendant in the district court of the second judicial district of the Territory of Arizona, county of Maricopa, upon a complaint filed therein on the 12th day of August, 1887.

The defendant filed his answer.

The cause came on regularly for trial at a regular term of said court.

The plaintiff and defendant appeared and were represented by their respective counsel.

A jury was expressly waived by all the parties to the action and the cause was tried to the court.

The pleadings of the respective parties were read to the court; whereupon the evidence was then adduced and showed the following facts:

On the 19th day of July, 1881, Nathaniel Ross was the owner of and on that day conveyed to Jonathan M. Bryan the S. E. ¼ of section two, T. 1 N., R. 3 E., G. & S. R. M., by grant, bargain,

37 and sale, deed duly made, executed, and delivered on that day and recorded in Book 6 of Deeds, page 577, on July 25th, 1881.

At that time the said J. M. Bryan was a married man and married to Vina Bryan, whose name appears hereafter as Vina Brown.

That afterwards, to wit, on the 29th day of August, 1883, said J. M. Bryan died without children and left as his sole heir the said wife, Vina Brown, who then became his heir and widow.

That afterwards, to wit, on the 13th day of September, 1883, the said M. W. Kales filed his application for letters of administration in the probate court of Maricopa county, Territory of Arizona, wherein said Bryan resided at the time of his death and where his estate was situated, and such proceedings were had thereon that the said Kales was duly appointed and became the administrator of said estate on the 24th day of September, 1883, and continued as such until the administration was closed, December 6th, 1884. Such proceedings were had in the administration of said estate that on the 6th day of December, 1884, the administration of said estate was settled and closed and the said administrator was discharged from his trust. Said S. E. ¼ sec. 2, T. 1 N., R. 3 E., G. and S. R. M., was not distributed by any such proceedings or by the administrator in the administration of said estate.

That afterwards the said Vina Brown, the widow of said J. M. Bryan, deceased, married one R. D. Brown.

That afterwards, to wit, on the 29th day of June, 1887, the said Vina Bryan in her name as it then was, Vina Brown, conveyed to this plaintiff, T. J. Bryan, by deed of conveyance, granting, conveying, remising, releasing, and forever quitclaiming all of the S. E. ¼ of sec. 2, T. 1 N., R. 3 E., G. and S. R. M., which deed was dated on that day and duly acknowledged and recorded on the 30th day of

32 June, 1887, in the Book 15 of Deeds, page 522, Maricopa county records, for the consideration of one dollar; that said deed from Nathaniel Ross to J. M. Bryan, dated July 19th, 1881, is a common source of title both for plaintiff and defendant.

Article 2.

38 That during his lifetime and while he was still married to the said Vina Bryan, to wit, on the 26th day of May, 1882, the said J. M. Bryan made, executed, and delivered a promissory note to the defendant Kales for the sum of $5,615, payable on the 26th day of May, 1883, with interest, at the rate of 1½ % per month, from date until paid, and at the same time and while he was the owner of said S. E. ¼ sec., T. 1, R. 3 E., G. and S. R. M., he and his wife, Vine Bryan, made, executed, and delivered to the said Kales a mortgage of all of said S. E. ¼ sec. 2, T. 1 N., R. 3 E., G. and S. R. M., for the purpose of securing the said promissory note, which said mortgage was duly signed and acknowledged by both J. M. Bryan and Vina Bryan, his wife, and delivered to the said Kales and recorded on the 27th day of May, 1882, in Book 2 of Mortgages, pages 280 *et seq.*, records of Maricopa county.

Defendant claims title and right of possession to the premises by sheriff's deed based on an order of sale issued out of the district court of the second judicial district of the Territory of Arizona, on an action founded on the said promissory note and mortgage executed by said J. M. Bryan and Vina Bryan, his wife, to said M. W. Kales on the 26th day of May, 1882, the facts of which suit and action are as follows:

The said M. W. Kales, while he was administrator of the estate of J. M. Bryan, deceased, as aforesaid, and while he was the owner of said note and mortgage, brought an action in said district court by a complaint filed on the 3rd day of October, 1883, and within 9 days after he was appointed administrator of the estate of J. M. Bryan, deceased, aforesaid, in which he, M. W. Kales, as plaintiff, sued himself, M. W. Kales, administrator of the estate of J. M. Bryan, deceased, defendant, and Vina Bryan, defendant, and in which he complained upon said promissory note and said mortgage and asked for judgment upon the note and foreclosure of the mortgage and the sale of the premises thereby conveyed to satisfy said judgment, to which suit Vina Bryan was made a party defendant, and *lis*

39 *pendens* was duly filed on same day in office of county recorder of Maricopa county.

A summons was duly issued out of said court on the 3rd day of October, 1883, and duly served on M. W. Kales, administrator, the defendant named in the action, on the same day, and also upon the same day was duly served upon said Vina Bryan, and afterwards, on the 6th day of October, 1883, said M. W. Kales, administrator, as defendant, made answer and admitted each and every allegation in said complaint and consented that judgment and decree be entered in accordance with the prayer thereof.

And the said Vina Bryan, answering the complaint of the plaintiff herein, "denies any individual indebtedness on her part to the said plaintiff; admits each and every material allegation in said complaint, in so far as the same does not imply a personal liability on her part, and disclaims all right, title, and interest in the property mentioned in the complaint as in any way conflicting with the

mortgage set forth in the complaint, and, thus answering, prays to be dismissed."

That afterwards, to wit, on the 16th day of October, 1883, the same being a day of the regular term of said court, the said cause came on for trial, and, the same having been tried and duly submitted, the said court on the 16th day of October, 1883, rendered judgment against M. W. Kales, administrator of the estate of J. M. Bryan, deceased, defendant, in favor of M. W. Kales, plaintiff, for the sum of $5,330.82, and entered a decree to foreclose said mortgage, and ordered that the S. E. ¼ of sec. 2, T. 1 N., R. 3 E., G. and S. R. M., be sold to satisfy said judgment, and that all defendants be barred and foreclosed of all equity of redemption and claim in, of, and to said premises from and after the delivery of the sheriff's deed.

That afterwards, to wit, on the 10th day of November, 1883, an order of sale for the sale of said premises was issued out of the said court on said judgment and delivered to the sheriff of Maricopa county for execution.

40 That afterwards, to wit, on the 15th day of December, 1883, the said sheriff of Maricopa county, having advertised said S. E. ¼ of sec. 2, T. 1 N., R. 3 E., G. and S. R. M., for sale under said judgment for the time prescribed by law, did offer the same for sale to the highest bidder, for cash, and did then sell the same to the said M. W. Kales for the sum of $4,500 *dollars*, that being the highest price bid, and did then issue to said M. W. Kales a sheriff's deed therefor.

Article III.

To prove which facts on the part of the defendant they introduced in evidence—

First. A mortgage conveyance for the S. E. ¼ of sec. 2, T. 1 N., R. 3 E., G. and S. R. M., executed by J. M. Bryan and Vina Bryan, his wife, on the 26th day of May, 1882, to M. W. Kales, to secure the payment of a note given to Kales by J. M. Bryan, bearing the same date, for $5,615, with interest thereon at 1½ per cent. per month, payable on the 26th day of May, 1883, which mortgage was recorded in Book 2 of Mortgages, at page 288, May 26th, 1882, records of Maricopa county.

Second. The judgment-roll in the case of M. W. Kales against M. W. Kales, administrator of the estate of J. M. Bryan, deceased, and Vina Bryan, foreclosing the mortgage just referred to, being case number 327 of the second district court of Arizona, county of Maricopa.

Third. The order of sale issued upon the judgment and decree contained in the judgment-roll in case No. 327, dated the 10th day of November, 1883, together with the return of the sheriff thereon, which showed that on the 15th day of December, 1883, the sheriff of said Maricopa county sold said S. E. ¼ of sec. 2, T. 1 N., R. 3 E., G. and S. R. M., to M. W. Kales for $4,500, to M. W. Kales, the defendant, — dollars, and that he paid that amount for it, and that said premises sold for their market value.

41 Fourth. The sheriff's certificate of sale from said sheriff, L. H. Orme, to M. W. Kales, dated 15th day of December, 1883, for said S. E. ¼ of sec. 2, T. 1 N., R. 8 E., G. and S. R. M.

That from date of sale to time of commencement of this action, No. 775, M. W. Kales paid $434.88 taxes and $3,048.37 in improvements upon said land.

Fifth. The sheriff's deed from said sheriff, L. H. Orme, to M. W. Kales for said S. E. ¼ of sec. 2, T. 1 N., R. 3 E., G. and S. R. M., dated and executed 19th day of June, 1884, and recorded Book 10 of Deeds, pg. 323, Maricopa county records.

Article IV.

It was proven that M. W. Gales, the plaintiff in said suit No. 327, was the same person as M. W. Kales, administrator, the defendant in said suit.

That at the time of the commencement of this action the defendant was in the possession of said premises.

That none of said property was sold by the administrator of the Jonathan M. Bryan estate in the course of administration.

That the note and mortgage executed by J. M. Bryan and Vina Bryan to M. W. Kales have not been paid or satisfied in any way unless it has been paid or satisfied by virtue of the aforesaid sale.

The parties having agreed upon the above statement of facts, I have examined the same and find it correct, and now approve and sign the same.

JOSEPH H. KIBBEY, *Judge.*

The above statement of facts prepared by the plaintiff and submitted to the defendant is agreed to be the statement of fact in the case.

E. J. EDWARDS,
GOODRICH & STREET,
Att'y- for Plaintiff.
BAKER & CAMPBELL,
Att'ys for Defendant.

42 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
M. W. KALES, Defendant. } No. 775.

Whereas in the above numbered and entitled cause, pending in the district court of the second judicial district in and for Maricopa county, and at a regular term of said court, to wit, on the 6th day of December, A. D. 1890, the said M. W. Kales recovered judgment against the said T. J. Bryan "that M. W. Kales, the defendant, is not guilty of the wrongs and trespasses in plaintiff's complaint alleged against him; that the plaintiff, T. J. Bryan, recover nothing

by this action, and that the defendant, M. W. Kales, do have and recover of and from the plaintiff, T. J. Bryan, the sum of $58.40, defendant's costs and disburs-ments incurred in this action," from which judgment the said T. J. Bryan has taken an appeal to the supreme court of the Territory of Arizona and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, T. J. Bryan, as principal, and W. T. Smith — C. H. Gray, as sureties, acknowledge ourselves bound to pay M. W. Kales the sum of five hundred dollars, conditioned that the said T. J. Bryan shall prosecute his appeal with effect and will pay all costs which have accrued in the appellate court, and, in case the judgment of the appellate court shall be against him, that he will perform its judgment, sentence, or decree and will pay all such damages as may be awarded against him on the appeal.

T. J. BRYAN. [SEAL.]
W. T. SMITH. [SEAL.]
C. H. GRAY. [SEAL.]

43 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

W. T. Smith and C. H. Gray, the sureties, being duly sworn, each for himself says that he is a resident freeholder of Maricopa county, and that he is worth the sum of five hundred dollars, the amount for which he has signed the foregoing bond, over and above all his just debts and liabilities, exclusive of property exempt from execution.

W. T. SMITH.
C. H. GRAY.

Subscribed and sworn to before me this 29th day of December, A. D. 1890.

FRANK COX,
[NOTARIAL SEAL.] *Notary Public.*

This bond on appeal was submitted to me on the 21st day of January, A. D. 1891, and was by me on that day approved, both as to the amount and the form of the bond and the sufficiency of the sureties, and filed by me on the 21st day of January, A. D. 1892, as appeal bond in this case.

J. H. STOUT, *Clerk.*

44 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Plaintiff, vs. M. W. KALES, Defendant. } District Court, No. 775; Supreme Court, No. —.

Appellant's Assignment of Errors.

The plaintiff and appellant assigns for errors as follows, to wit:

First Assignment of Errors.

In allowing as evidence the mortgage of J. M. Bryan and Vina Bryan, his wife, to M. W. Kales, dated 26th day of May, 1882, together with the note described in said mortgage for $5,615, as specified in plaintiff's first bill of exceptions.

Second Assignment of Error.

In allowing as evidence the judgment-roll in the case of M. W. Kales against M. W. Kales, administrator, being district court, No. 327, as specified in plaintiff's second bill of exceptions.

Third Assignment of Error.

In allowing as evidence a copy of the judgment an- decree and return of sheriff thereon in case No. 327, district court, as specified in plaintiff's third bill of exceptions.

Fourth Assignment of Error.

In allowing as evidence the certificate of sale from Orme, sheriff, to Kales, as specified in plaintiff's fourth bill of exceptions.

45 *Fifth Assignment of Error.*

In allowing as evidence the sheriff's deed from Orme to Kales, as specified in plaintiff's fifth bill of exceptions.

Sixth Assignment of Error.

In allowing the defendant as a witness in his own behalf to testify that he had never received any money on the mortgage; that he bought the property for $4,000, and that the mortgage was paid only by the purchase of the land, as specified in plaintiff's sixth bill of exceptions.

Seventh Assignment of Error.

In overruling the plaintiff's general and special demurrer to the defendant's amended answer, and in allowing the amended answer to stand, as specified in plaintiff's seventh bill of exceptions, and overruling demurrer to answer filed May 19th, 1890.

Eighth Assignment of Error.

In overruling plaintiff's motion for a new trial, and in holding that the errors alleged to have been committed by the court, as specified in paragraphs 1, 2, 3, 4, and 5 in plaintiff's bill of exception to the overruling of his motion for a new trial, were not errors sufficient to grant a new trial, either collectively or singly, and in holding that the judgment for the defendant instead of for the plaintiff was not error, as specified in said bill of exceptions.

Ninth Assignment of Error.

In rendering judgment for the defendant instead of for the plaintiff on the whole evidence, and for that the judgment is contrary to the law and the evidence and is unsupported by the evidence.

46 *Tenth Assignment of Error.*

The court erred in not rendering judgment for the plaintiff instead of for the defendant upon the whole evidence, for that the whole evidence shows that under the law the plaintiff was the owner and entitled to the land in dispute and was entitled to the possession of it and had been ousted therefrom by the defendant, and that defendant was in possession against plaintiff's right of possession; that the judgment and certificate of sale from the sheriff and the sheriff's deed by which defendant got into possession were void and gave defendant no right or title to the possession of any part of said premises.

Wherefore this plaintiff and appellant prays that the judgment of the district court be set aside.

Second. That this supreme court render such judgment as the court below should have rendered, and adjudge that this plaintiff have judgment against the defendant for the possession of the premises in dispute.

Third. Or if this supreme court shall not proceed to render such judgment, then that the judgment of the district court be reversed and the plaintiff have a new trial.

GOODRICH & STREET,
E. J. EDWARDS,
Att'y- for Appellant.

47 TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

I, C. H. Knapp, clerk of the district court, third judicial district of the Territory of Arizona in and for the county of Maricopa, do hereby certify the foregoing to be a full, true, and correct transcript of the judgment-roll, the pleadings, summons, minute entries, bill of exceptions, statement of facts, motion for a new trial, order overruling same, the final judgment, motion of appeal in open court, bond on appeal and assignment of errors, and of the proceedings

had in the action entitled T. J. Bryan, plaintiff, *vs.* M. W. Kales, defendant.

And I further certify that the November term, 1890, at which final judgment thereon was rendered, has not been finally adjourned.

In witness whereof I have hereunto set my hand and affixed the seal of said district court this 18th day of August, A. D. 1891.

[SEAL.] C. H. KNAPP, *Clerk.*

Appellant's costs..... $35 50
Appellee's costs..... 58 40

Transcript demanded by Goodrich and Street April 8th, 1891.
Transcript delivered to Goodrich & Street August 22nd, 1891.

48 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Appellant,
vs.
M. W. KALES, Appellee. } No. 325.

Judgment.

This cause having been heretofore argued and submitted and by the court taken under advisement and the court having fully considered the same and being fully advised in the premises,

It is hereby ordered, adjudged, and decreed that the judgment rendered in the court below be, and the same is hereby, affirmed.

And it is further ordered that the appellee do have and recover from the appellant his costs herein expended, taxed at $—, and have execution therefor.

September 29, 1892.

49 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Appellant,
vs.
M. W. KALES, Appellee. } No. 327.

Statement of facts by the supreme court of the Territory of Arizona, in the nature of a special verdict, on appeal to the Supreme Court of the United States.

This cause came on to be tried in the supreme court of the Territory of Arizona, sitting as a court of appeal, on the foregoing transcript on appeal from the district court of the second (now third) judicial district of Arizona, where the case was tried without a jury, a jury having been expressly waived.

The supreme court takes the facts found by the district court on the trial of the cause in that court and as agreed to by the counsel for the respective parties as the facts in the case and makes such statement of facts as found in the transcript a part of this statement of facts.

From such transcript this court finds that the district court did not commit error in doing the things set out in any of plaintiff's bills of exceptions; that the district court did not commit error in overruling plaintiff's motion for a new trial and as set out in his bill of exceptions in that particular; that the district court did not commit error in doing the things set out in appellant's assignment of error on appeal to the supreme court of Arizona, and this supreme court further finds that the judgment of the district court ought to be affirmed, and judgment of affirmance is therefore rendered as follows, to wit:

50 In the Supreme Court of Arizona.

T. J. BRYAN, Appellant,
vs.
M. W. KALES, Appellee. } No. 327.

This cause having been heretofore argued and submitted and by the court taken under advisement, and the court having fully considered the same and being fully advised in the premises, it is hereby ordered, adjudged, and decreed that the judgment rendered in the court below be, and the same is hereby, affirmed; and it is further ordered that the appellee do have and recover from the appellant his costs herein expended, taxed at $—, and have execution therefor.

September 29th, 1892.

The above statement is correct.

BAKER & CAMPBELL,
Attorneys for Appellees.
GOODRICH & STREET,
Attorneys for Appellants.

HENRY C. GOODING,
Chief Justice of the Supreme Court of Arizona.

51 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Appellant,
vs.
M. W. KALES, Appellee. } Appeal from District Court, Maricopa County. J. H. Kibby, Judge.

Webster Street and Ben. Goodrich, for appellant; Baker & Campbell and Clark Churchill, for appellee.

Opinion by Sloan, J.

This is a suit in ejectment brought by appellant in the district court of Maricopa county against appellee for the possession of the southeast quarter of section two, township one north, range three east, Gila and Salt River meridian.

There was a judgment for appellee. From this judgment appellant brings his appeal. A brief summary of the facts proven will give an understanding of the questions presented by this appeal.

It appears that on the 28th day of August, 1883, one Jonathan M. Bryan died intestate, leaving Vina Bryan his widow and sole heir.

That on the 24th day of September, 1883, one M. W. Kales was appointed administrator of the estate of said deceased, Bryan.

It further appears that on the 16th day of October, 1883, in the district court of Maricopa county, in the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, and Vina Bryan, defendant, a judgment and decree
52 foreclosing a mortgage of said premises and ordering a sale of the same was fully entered of record.

The record of this judgment discloses that said mortgage was given to secure a certain promissory note executed by said deceased, Bryan, in favor of M. W. Kales for the sum of $5,330.82; that said Vina Bryan was the wife of said deceased, Bryan, joined in the execution of said mortgage. The record further discloses that said Vina Bryan appeared in case and filed an answer to the complaint, in substance denying any individual indebtedness on her part and disclaiming any right, title, or interest in the premises covered by the mortgage as in any way conflicting with the mortgage set forth in the complaint and praying to be dismissed from said action. Thereupon judgment was entered in favor of said M. W. Kales, administrator aforesaid, for the amount due on said note and a decree entered for the sale of said mortgaged premises.

It further appears that on the 11th day of November, 1883, the said premises were sold by the sheriff to satisfy said mortgage, and that at said sale M. W. Kales became the purchaser thereat, paying the full market value of the land at the time and receiving a certificate of sale.

That six months thereafter, there having been no redemption, the sheriff executed a deed to the same in the name of M. K. Kales as the grantee; that thereafter Kales went into possession of said premises and has remained in possession ever since, paying taxes and making valuable and lasting improvements thereon. It further appears that Vina Bryan, the widow and sole heir of said Jonathan M. Bryan, deceased, by quitclaim deed dated 29th June, 1887, conveyed such interest as she then had to appellant, T. J. Bryan, who thereupon brought this suit.

The principal contention upon this appeal relates to the correctness of the ruling of the court upon the trial, permitting the introduction of the sheriff's deed and the judgment of foreclosure under which it was made as evidence of title in the appellee, the appellant contending that the judgment was void upon the face of the record, and thus collaterally open to attack, for the reason that it showed that M. W. Kales, plaintiff, and M. W. Kales, defendant, were one and the same person.

53 I am of the opinion that if upon the face of the record in the suit of M. W. Kales *vs.* M. W. Kales, administrator, it appeared that M. W. Kales, plaintiff, was the same person as M. W. Kales, administrator, that the judgment entered in said cause must be treated as utterly void and no evidence of title in the pur-

chaser under the foreclosure and sale of the mortgaged premises made under it.

That adversary parties are essential in every cause is fundamental almost; one may not sue himself any more than he may contract with himself. Neither may one sue himself in a representative capacity, for, after all, there is but one person before the court as plaintiff and defendant, and no refinement of reason can, without violence to common sense and manifest absurdity, make it appear otherwise.

The authorities, so far as I have investigated, are unanimous that no suit can be maintained by an individual against himself as an administrator of an estate. It is not the case of a trustee dealing with himself, which is sometimes permitted, but the altogether different question of a want of jurisdiction in the court to render judgment without adversary parties before it.

It is settled doctrine that a domestic judgment of a court of record, unless directly impeached, imp*p*orts absolute*l* verity as to every jurisdictional fact of which the record speaks and is clothed in the conclusive presumption that every jurisdictional fact exists of which the record may be silent. It is essential, therefore, to determine whether the record in the foreclosure suit of Kales *vs.* Kales, administrator, disclosed the fact that M. W. Kales, the mortgagee and plaintiff, was the same person as M. W. Kales, administrator and defendant in said suit.

It is strongly urged by the counsel for the appellant that this fact does appear upon the face of the record of that cause, inasmuch as it should be presumed alone from the similarity of names, applying the rule of evidence that identity of names is *prima facie* evidence of identity of person. An examination of authorities will show that this rule of evidence is not one of universal application.

54 That it grew out of the general presumption in favor of the validity of contracts, the regularity of land titles, and the integrity of records; that wherever its effect would be to negative these general presumptions, the reason of the rule ceasing to exist, the rule itself becomes inoperative; that hence it can have no application to a case like the one at bar, if indeed it applies at all to a judgment of a court of record, where the effect of its application would be to impeach and destroy its effect as a valid and binding estoppel of record.

In the case Wilson *vs.* Benedict, 90 Mo., 209, the court held that where a petition recited that one James B. Melone was a member of the plaintiff firm and that one James B. Melone was a member of the defendant firm it was not to be assumed upon demurrer from that fact alone that they were the same person. The court in that case used this language: "The rule that from identity of nam identity of person may be assumed has no application in this case, and cannot be extended so far as to uphold as an inference that where a plaintiff sues a de*f*endant ha*w*ing the same name as that of plaintiff that both persons were one and the same person."

In Prescott *vs.* Teffts, 7 Mass., 209, where the record disclosed that one James Prescott was the plaintiff and that one Hon. James Pres-

cott was the judge before whom the case was tried, it was held that it will not be presumed from the identity of name that the two were the same person.

In Dorente *vs.* Sullivan, 6 Cal., 279, it was held that it was not to be presumed that an affidavit of service of summons was made before a party to the action from the mere fact that the name of the plaintiff and the name of the justice of the peace before whom it was made were identical. In Stevenson *vs.* Murray, 87 Ala., 442, it acpeared that one Hugh Stevenson was an administrator of an estate. Under the statute of that State, which required in the proceedings for the sale of lands belonging to a decedent's estate that the necessity for such sale be made to appear to the satisfaction of the court by the testimony of two disinterested witnesses, said administrator filed his petition for the sale of land belonging to the estate. The record of the proceedings showed that at the
55 hearing of the petition *that* the necessity for such sale was made to appear to the satisfaction of the court "by the oaths of Hugh Stevenson and August Lorenson, disinterested witnesses." The court held that in action to set aside an order for sale entered at the hearing of said petition *that* it would not be presumed that the Hugh Stevenson who filed a petition as administrator was the same Hugh Stevenson who appeared as a witness at the hearing of said petition.

The cases cited above are to my mind convincing that the rule that identity of name if *prima facie* evidence of identity of person has no application where solemn records of court of record would thereby be discredited and their integrity be impeached.

The cases cited by counsel for appellant in their brief are not in conflict with this view, as an examination will show.

The case of Harwood *vs.* Harwood, 29 Cal., 515, much relied upon by counsel, is an altogether different case from any of the foregoing.

In this case, parol evidence having been introduced to establish the identity of parties named in the record of the appointment of an administrator with the parties before the court in a suit involving the same subject-matter, the court stated that, in their opinion, the mere identity of name was *prima facie* sufficient to establish the identity of persons.

The effect of the evidence was not to add to the record nor to vary or impeach it in any way, but merely to show the connection between it and the pending controversy, and the rule could, as suggested by the court, very well apply to such a case. To the same effect are the cases of Thompson *vs.* Manrow, 1 Cal., 428, and Campbell *vs.* Wallace, 46 Mich., 320.

The cases of Gitt *vs.* Watson, 18 Mo., 274; Goodell *vs.* Hibbard, 22 Mich., 55; Jackson *vs.* King, 5 Cow., 239, cited by counsel, are cases different materially from the case at bar in this, that the rule *idem sonans* was invoked therein in aid of land title by showing the identity of grantee in one instrument to be the same as the grantor in another instrument, or the identity of a patentee to land
56 and the ancestor of one setting up title to the same. Aside

from the consideration of the cases, there does not seem to be any sufficient reason why it should be presumed from the mere similarity of names that the court should entertain jurisdiction and enter its judgment in a case where both plaintiff and defendant are one and the same person, when, as a matter of fact, they may have been different persons. I am therefore of the opinion that the judgment of the case of Kales *vs.* Kales, administrator, was not therefore open to attack in this action. This view of the law renders it unnecessary to pass upon the question whether the appearance of Vina Bryan and her answer in the case of Kales *vs.* Kales, administrator, constitutes an estoppel of record as to her.

It is likewise unnecessary to discuss the effect of a contrary holding to the one above as entitling the appellant to recover in this action.

I may state, however, that in my opinion that even were the judgment in the case of Kales *vs.* Kales, administrator, void upon its face and ther- be no estoppel of record on the part of appellant's grantor, Vina Bryan, then that, in my judgment, all the facts exist which could constitute appellee mortgagee in possession of the premises sued for, and that therefore so long as the mortgage debt remains unpaid he could not therefore be dispossessed.

The judgment is therefore affirmed.

RICHARD E. SLOAN, *A. J.*

I concur in the affirmance of the judgment on the ground of the appellee being a mortgagee in possession.

HENRY C. GOODING, *C. J.*

I concur.

EDMUND W. WELLS, *A. J.*

57 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Appellant,
vs.
M. W. KALES, Appellee. } Minute Entry.

And now, in open court, on this first day of October, A. D. 1892, the appellant, by his counsel, gives notice of appeal and hereby does appeal to the Supreme Court of the United States from the judgment of the supreme court of the Territory of Arizona rendered against appellant on the 29th day of September, A. D. 1892, and prayed that said appeal be allowed; which appeal was then and there allowed by said supreme court of the Territory of Arizona.

58 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Plaintiff & Appellant,
vs.
M. W. KALES, Defendant & Appellee. } No. 327.

The above-named plaintiff and appellant, conceiving himself aggrieved by the final judgment, order, and decree entered by the

supreme court of the Territory of Arizona on the twenty-ninth day of September, A. D. 1892, in the above-entitled cause, in which the judgment of the district court of the second (now third) district of Arizona in and for the county of Maricopa was affirmed and in which said appellees were adjudged to recover of the appellant their costs, taxed at — ($—) dollars (which district court judgment was that plaintiff, on his complaint to recover possession of the south-east quarter of section two, township one north, of range three east, Gila and Salt River meridian, Maricopa county, Arizona, do recover nothing, and that defendant is not guilty of the wrongs and trespasses alleged, and that he recover his costs in the sum of $58.40), does hereby appeal from such judgment of the supreme court of the Territory of Arizona to the Supreme Court of the United States and pray that this their appeal may be allowed, and that a transcript of the record, proceeding, judgment, decision, and opinion in this cause be duly authenticated and sent to the Supreme Court of the United States.

T. J. BRYAN, *In Person.*
GOODRICH AND STREET,
Att'ys for Plaintiff & Appellant.

59 And now, on the thirteenth day of October, A. D. 1892, the appeal prayed for in the foregoing petition is hereby allowed, with citation to issue on filing a bond in the penal sum of five hundred ($500) dollars, with two good and sufficient sureties approved by the chief justice of the supreme court of Arizona or any associate justice thereof.

HENRY C. GOODING,
Chief Justice of the Supreme Court of Arizona.

60 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Plaintiff & Appellant,
vs.
M. W. KALES, Defendant & Appellee. } No. 327.

Affidavit of Value.

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss.:*

T. J. Bryan, being duly sworn, says that he is the plaintiff in the district court and appellant herein; that he is acquainted with the value of the property in dispute and amount in controversy in this cause described in the complaint, and that the value of said property is over five thousand dollars and is of the value of twenty thousand ($20,000.00) dollars, and that the value of the amount in controversy in this cause, exclusive of costs, is over five thousand dollars and is of the value of twenty thousand ($20,000.00) dollars.

Affiant says that he is not aware that the record in said cause shows the value of such property in said controversy, and that this affidavit is made for the purpose of truly showing the value thereof

to be above five thousand dollars, exclusive of costs, and for the purpose of perfecting an appeal of said cause to the Supreme
61 Court of the United States and of showing said court that they have jurisdiction of said cause on appeal so far as the value of the property or the amount in controversy is concerned.

T. J. BRYAN.

Subscribed and sworn to before me this 12th day of October, A. D. 1892.

T. D. HAMMOND,
[SEAL OF COURT.] *Clerk of Supreme Court.*

62 In the Supreme Court of the United States.

T. J. BRYAN, Plaintiff & Appellant,
vs.
M. W. KALES, Defendant & Appellee. } No. 327.

Know all men by these presents that we, T. J. Bryan, as principal and appeliant herein, and C. H. Gray and W. T. Smith, both of Maricopa, county and Territory of Arizona, being sureties for said principal, are held and firmly bound unto M. W. Kales, the appellee herein, in the sum of five hundred dollars ($500.00), to be paid to them, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of October, A. D. 1892.

63 Whereas the above-named appellant, T. J. Bryan, has obtained an allowance of appeal and has taken and prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered and entered against him in favor of M. W. Kales, the appellee herein, in the supreme court of the Territory of Arizona, on the twenty-ninth day of September, A. D. 1892, in an action then and there pending between them:

Now, the conditions of this obligation are such that if the above-named appellant shall prosecute his appeal to effect and shall answer all damages and costs if he fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed with our seals and dated this thirteenth day of October, A. D. 1892.

T. J. BRYAN. [SEAL.]
C. H. GRAY. [SEAL.]
W. T. SMITH. [SEAL.]

Sealed and delivered in presence of—

WEBSTER STREET.

64 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

On this thirteenth day of October, 1892, before me personally came T. J. Bryan, C. H. Gray, and W. T. Smith, known to me to be the same persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executedthe same for the purpose and consideration therein expressed.

Given under my hand and seal of office this thirteenth day of October, 1892.

[SEAL OF SUPREME COURT.] T. D. HAMMOND,
Clerk of the Supreme Court of Arizona.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

C. H. Gray and W. T. Smith, the sureties, being duly sworn, depose and say, each for himself, that he is a resident of Maricopa county, Arizona, and that he is worth double the sum of five hundred ($500.00) dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

C. H. GRAY.
W. T. SMITH.

Subscribed and sworn to before me this 20th day of October, A. D. 1892.

T. D. HAMMOND,
[SEAL OF SUPREME COURT.] *Clerk of Supreme Court.*

I hereby approve the above bond and the sufficiency of the sureties thereto.

HENRY C. GOODING,
Chief Justice of the Supreme Court of Arizona.

65 In the Supreme Court of the United States.

T. J. BRYAN, Plaintiff & Appellant, }
vs. } No. 327.
M. W. KALES, Defendant & Appellee. }

THE UNITED STATES OF AMERICA, ss:

To M. W. Kales:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the third Monday of a term thereof commencing on the second Monday of October, A. D. 1892, pursuant to and in answer to an appeal allowed by the supreme court of the Territory of Arizona, as appears by the record of said court, in open court at the term thereof at which the judgment appealed from was rendered, to wit, on the first day of October, A. D. 1892, and again allowed on the

thirteenth day of October, A. D. 1892, by the chief justice of the supreme court of the Territory of Arizona, from a judgment of the supreme court of the Territory of Arizona entered therein on the twenty-ninth day of September, A. D. 1892, and less than thirty days before the first day of the said term of said Supreme Court of the United States, in favor of you, M. W. Kales, and against T. J. Bryan, affirming the judgment theretofore rendered by the district court of the second (now third) judicial district of Arizona (which district court judgment was that plaintiff, on his complaint to recover
66 possession of the southeast quarter of section two, township one north, of range three east, Gila and Salt River meridian, Maricopa county, Arizona, do recover nothing *nothing*, and that defendant is not guilty of the wrongs and trespasses alleged, and that he recover his costs in the sum of fifty-eight dollars and forty cents).

And to show cause, if there be any, why the said judgment rendered against the appellant and in your favor should not be reversed, set aside, and corrected, and why judgment should not be rendered for the appellant, and why speedy justice should not be done in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

HENRY C. GOODING,
Chief Justice of the Supreme Court of the Territory of Arizona.

67 TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

This is to certify that we, the attorneys of record for M. W. Kales, appellee mentioned in the above citation, hereby admit and accept service of the above citation and acknowledge receipt of certified copy of the same at Phœnix, Arizona, the fourteenth day of October, 1892.

BAKER & CAMPBELL,
Attorneys for Appellee.

68 *Appellant's Assignment of Errors to the Supreme Court of the United States.*

In the Supreme Court of the United States.

T. J. BRYAN, Plaintiff and Appellant,
vs.
M. W. KALES, Defendant and Appellee. } No. 327.

Comes now the appellant and assigns as error as follows, to wit:

The supreme court of the Territory of Arizona, sitting as a court of appeal and reviewing the proceedings of the district court, erred in not finding that the district court erred on the trial of the cause—

First. In allowing as evidence the mortgage of J. M. Bryan and

Vina Bryan, his wife, to M. W. Kales, dated 26th May, 1882, together with the note described in said mortgage for $5,615.00, as specified in plaintiff's first bill of exceptions.

Second. In allowing as evidence the judgment-roll in the case of M. W. Kales against M. W. Kales, administrator, being district court case No. 327, as specified in plaintiff's second bill of exceptions.

Third. In allowing as evidence copy of the judgment and decree and return of sheriff thereon in case No. 327, district court, as specified in plaintiff's third bill of exceptions.

69 Fourth. In allowing as evidence the certificate of sale from Orme, sheriff, to Kales, as specified in plaintiff's fourth bill of exceptions.

Fifth. In allowing as evidence the sheriff's deed from Orme to Kales, as specified in plaintiff's fifth bill of exceptions.

Sixth. In allowing the defendant as a witness in his own behalf to testify that he had never received any money on the mortgage; that he bought the property for $4,000.00, and that the mortgage was paid only by the purchase of the land, as specified in plaintiff's sixth bill of exceptions.

Seventh. The supreme court erred in not finding the district court erred in overruling the plaintiff's general and special demurrer to the defendant's amended answer and in allowing the amended answer to stand, as specified in plaintiff's seventh bill of exceptions, and overruling demurrer to answer filed May 19, 1890.

Eighth. The supreme court erred in not finding the district court erred in overruling plaintiff's motion for a new trial and in holding that the errors alleged to have been committed by the court, as specified in paragraphs 1, 2, 3, 4, and 5 in plaintiff's bill of exceptions to the overruling of his motion for a new trial, were not errors sufficient to grant a new trial, either collectively or singly, and in holding that the judgment for the defendants instead of for the plaintiff was not error, as specified in said bill of exceptions.

Ninth. The supreme court erred in not finding the district court erred in not rendering judgment for the defendant instead of for the plaintiff on the whole evidence, and for that the judgment is contrary to the law and the evidence and is unsupported by the evidence.

Tenth. The supreme court erred in not finding the district court erred in not rendering judgment for the plaintiff instead of

70 for the defendant upon the whole evidence, for that the whole evidence shows that under the law the plaintiff was the owner and entitled to the land in dispute and was entitled to the possession of it and had been ousted therefrom by the defendant, and that defendant was in possession against plaintiff's right of possession; that the judgment and certificate of sale from the sheriff and the sheriff's deed by which defendant got into possession were void and gave defendant no right to the possession of any part of said premises.

Eleventh. The supreme court erred in not reversing the judgment of the district court.

Twelfth. The supreme court erred in affirming the judgment of the district court.

Thirteenth. The supreme court — in not rendering a judgment for the plaintiff and appellant and in holding that plaintiff and appellant could not recover in this action the property sued for.

GOODRICH AND STREET,
Attorneys for Appellant.

71 *Prayer for Reversal.*

Wherefore appellant prays—

First. That the judgment of the supreme court of Arizona affirming the judgment of the district court be set aside and reversed.

Second. That the Supreme Court of the United States render judgment as the supreme court of Arizona should have rendered and as the district court should have rendered, and that they adjudge that this plaintiff and appellant have judgment against the defendants and appellees for the possession of the property in dispute.

Third. If this Supreme Court shall not proceed to render judgment, then that plaintiff and appellant have a new trial.

GOODRICH AND STREET,
Attorneys for Appellant.

72 SUPREME COURT, } ss:
Territory of Arizona, }

I, T. D. Hammond, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing printed and written pages, numbered from 1 to —, inclusive, are a full, true, and correct transcript of the record and proceedings in the cause Thomas J. Bryan *vs.* M. W. Kales, as the same appears of record and on file in my office, including the transcript on appeal from the district court of the second judicial district of Arizona in and for Maricopa county to the supreme court of Arizona,

The minute entries and judgment of said supreme court affirming the judgment of said district court,

The opinion of the judges in affirming said judgment,

And the proceedings on appeal from the judgment of the supreme court of Arizona to the Supreme Court of the *Supreme Court of the* United States, including—

Notice of appeal in open court.
Petition for allowance of appeal.
Allowance of appeal.
Oath as to value of property.
Bond on appeal.
Citation to defendants and service of same.
Statement of facts.
Assignment of errors.
Prayer of reversal.

Witness my hand and seal of said court this 22nd day of November, A. D. 1892.

[Seal Supreme Court of Arizona.]

T. D. HAMMOND,
Clerk of the Supreme Court of Arizona.

Endorsed on cover: Case No. 15,226. Arizona Territory supreme court. Term No., 198. T. J. Bryan, appellant, *vs.* M. W. Kales. Filed December 8th, 1892.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. 499

T. J. BRYAN, APPELLANT,

vs.

D. H. PINNEY, MARY E. PINNEY, M. H. [illegible],
GEORGE H. MITCHELL, GEORGE W. [illegible],
BANK OF NAPA.

APPEAL FROM THE SUPREME [illegible]